

**United States Department of Labor
Employees' Compensation Appeals Board**

A.F., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, PHILADELPHIA)
INTERNATIONAL AIRPORT, Philadelphia, PA,)
Employer)**

**Docket No. 12-713
Issued: March 13, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On February 13, 2012 appellant, through her attorney, filed a timely appeal from a December 19, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of information clerk.

On appeal, appellant's attorney asserts that the decision is contrary to fact and law.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On April 17, 2007 appellant, then a 57-year-old lead transportation security screener, sustained an employment-related lumbar sprain and right rotator cuff sprain.² She was placed on the periodic compensation rolls. On September 19, 2007 and June 4, 2008 Dr. Paul A. Marchetto, an attending Board-certified orthopedic surgeon, performed arthroscopic right shoulder rotator cuff procedures.

In November 2008, OWCP referred appellant to Dr. Zohar Stark, a Board-certified orthopedist, for a second opinion evaluation. In a December 9, 2008 report, Dr. Stark noted the history of injury, his review of the medical record and appellant's complaints of right shoulder and radiating low back pain. Physical examination demonstrated normal cervical range of motion. There was tenderness over the right trapezius muscle with no spasm and no apparent sensory deficit of the upper extremities. Right upper extremity motor strength and range of motion were not tested due to allegations of severe pain. Lumbosacral range of motion was decreased. Lower extremity sensory and motor examinations were normal. Dr. Stark advised that appellant had a frozen right shoulder caused by the April 17, 2007 work injury. He indicated that her low back complaints were due to degenerative disc disease and not due to the April 2007 lumbar sprain. Dr. Stark concluded that appellant could not return to her previous employment as a security screener due to the frozen shoulder and low back restrictions of no repetitive bending or standing for a prolonged length of time. In an attached work capacity evaluation, he advised that she was permanently unable to perform the duties of her prior position. In a supplementary report dated December 30, 2008, Dr. Stark advised that appellant could work with no use of the right shoulder.

By report dated January 15, 2009, Dr. Marchetto advised that appellant continued to have problems with her right shoulder.

In May 2009, OWCP referred appellant to Sherry Kristal-Turetzky, a vocational rehabilitation counselor. Appellant was approved for disability retirement and elected to continue to receive FECA benefits. On August 30, 2010 the vocational rehabilitation counselor identified the positions of cashier two and information clerk as within the light strength category, with occasional lifting of 20 pounds. She advised that, based on May 2009 Bureau of Labor Statistics data from Metropolitan Philadelphia, Pennsylvania, the positions were reasonably available in the local labor market at entry level annual wages of \$370.00 and \$526.00 a week respectively. Appellant began a job search in March 2010.

² The acceptance letter indicated that a left upper extremity injury was accepted. This was later changed to the right upper extremity.

By letter dated June 3, 2011, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as an information clerk.³ It indicated that she was released to full-time work and that the information clerk position was within the permanent restrictions identified by Dr. Stark. OWCP further noted that the labor market survey prepared by the rehabilitation counselor indicated that the position was reasonably available in the local labor market at a weekly wage of \$526.00.

Appellant and her attorney disagreed with the proposed reduction, stating that she had unsuccessfully applied for many jobs and did not have the capacity to earn wages in excess of \$500.00 a week.

By decision dated July 6, 2011, OWCP reduced appellant's compensation benefits, effective July 31, 2011, based on her capacity to earn wages as an information clerk, which yielded a 45 percent loss of wage-earning capacity. Appellant, through counsel, timely requested a hearing, that was held on October 13, 2011. Counsel argued that there was no such job as an information clerk. Appellant testified regarding her job search. She indicated that she had four years of college education and that she was currently working as a part-time greeter for the Philadelphia Phillies. Appellant stated that she continued to see her physician every two months. In reports dated November 3, 2011, Dr. Marchetto described her surgical history. He stated that five days previously appellant fell and broke her right humerus; thus he was unable to evaluate her rotator cuff progress. In a November 3, 2011 work capacity evaluation, Dr. Marchetto indicated that she could work eight hours a day with restrictions of no overhead lifting; one hour reaching above the shoulder; one to four hours pushing, pulling and lifting, with a lifting restriction of 10 to 20 pounds.

On November 4, 2011 the workers' compensation coordinator for the employing establishment provided comments on the hearing transcript.⁴ Information regarding bills processed by ACS from May 2009 through August 2010 was attached.

By decision dated December 19, 2011, OWCP's hearing representative affirmed the July 6, 2011 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to

³ *The Dictionary of Occupational Titles* describes an information clerk's duties as: provides travel information for arrivals, stops and destinations of schedules buses or trains; describes routes, services and accommodations available; furnishes patrons with timetables and travel literature; computes and quotes rates for trips, group tours and special discounts using rate tables. It has a light strength level with frequent physical demands of reaching, handling and near acuity, with a general educational development level of education. The rehabilitation counselor stated that the occupation was unskilled and from 2006 to 2016, a 13 percent increase was projected, based on data provided by the Pennsylvania Department of Labor and Industry and the U.S. Department of Labor.

⁴ The workers' compensation coordinator indicated that she had found multiple job listings for information clerk in the Philadelphia area and, following review of ACS, OWCP bill processing portal, disagreed with appellant's testimony that she visited her physician every two months.

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶

Section 8115 of FECA and OWCP regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of his or her injury, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his disabled condition.⁷

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹⁰ Finally, application of the principles set forth in *Albert C. Shadrick*, as codified in section 10.403 of OWCP's regulations, will result in the percentage of the employee's loss of wage-earning capacity.¹¹

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to

⁶ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁷ 5 U.S.C. § 8115; 20 C.F.R. § 10.520 (2011); *John D. Jackson, id.*

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson, supra* note 6.

¹⁰ *Supra* note 7.

¹¹ The formula for determining loss of wage-earning capacity was developed in the *Albert C. Shadrick* decision, 5 ECAB 376 (1953), and is codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job. See *J.C.*, 58 ECAB 700 (2007).

perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹²

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation on July 31, 2011 based on her capacity to earn wages in the constructed position of information clerk.

The medical evidence, as characterized by the December 9 and 30, 2008 reports provided by Dr. Stark, OWCP's referral physician, established that appellant was no longer totally disabled. OWCP referred her for vocational rehabilitation in May 2009. Because appellant was unable to secure employment, the vocational rehabilitation counselor identified two positions, cashier 2 and information clerk, that she felt fit appellant's capabilities. OWCP determined that she had the capacity to earn wages as an information clerk.

In his December 30, 2008 report, Dr. Stark indicated that appellant could return to full-time work with no use of the right shoulder. He did not limit the use of her right and left hands and arms. The position description for information clerk found in the Department of Labor's *Dictionary of Occupational Titles* describes the duties of the information clerk position as: provides travel information for arrivals, stops and destinations of schedules buses or trains; describes routes, services and accommodations available; furnishes patrons with timetables and travel literature; computes and quotes rates for trips, group tours and special discounts using rate tables. It has a light strength level with frequent physical demands of reaching, handling and near acuity, with a general educational development level of education.¹³ The vocational rehabilitation counselor advised that the position was reasonably available in the local labor market with an entry-level weekly wage of \$526.00.

Following OWCP's reduction of benefits based on the constructed position, appellant requested a hearing and submitted additional reports from Dr. Marchetto who indicated that appellant could work eight hours a day with restrictions of no overhead lifting; one hour of reaching above the shoulder; one to four hours of pushing, pulling and lifting, with a lifting restriction of 10 to 20 pounds.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of information clerk represented her wage-earning capacity.¹⁴ The evidence of record establishes that she had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. OWCP therefore properly determined that the

¹² *John D. Jackson, supra* note 6.

¹³ *Supra* note 3.

¹⁴ *James M. Frasher, supra* note 5.

position of information clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula,¹⁵ properly reduced her compensation effective July 31, 2011.¹⁶

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP met its burden to justify reduction of appellant's wage-loss compensation on the grounds that she had the capacity to earn wages in the constructed position of information clerk.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁵ *Supra* note 11.

¹⁶ *James Smith*, 53 ECAB 188 (2001).